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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

BRYAN DUNCAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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**ANSWER OF THE STATE OF WASHINGTON TO PETITION  
FOR REVIEW**

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ROBERT M. MCKENNA  
Attorney General

JOSHUA CHOATE  
Assistant Attorney General  
WSBA #30867  
Criminal Justice Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2011

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## **I. RESPONDENT**

The Respondent is the State of Washington, the Petitioner in the trial court below.

## **II. DECISION BELOW**

The decision being appealed is from a published opinion by the Court of Appeals, Division III, filed on December 4, 2007, which affirmed an order civilly committing Bryan Duncan (Duncan) as a sexually violent predator (SVP). A copy of the opinion is attached hereto as Appendix 1.

## **III. ISSUES FOR REVIEW**

Duncan asserts that the order committing him as an SVP should be reversed and the SVP petition dismissed because, he alleges, the trial court made erroneous evidentiary rulings during his SVP commitment trial. Specifically, Duncan claims that admission of evidence that he refused to undergo a psychological examination, and evidence that Duncan planned to live with a fellow sex offender if released from confinement was improper. Duncan also argues that the trial court erroneously precluded cross-examination of the state's expert witness about the effectiveness of the special needs sex offender treatment program at the Special Commitment Center on McNeil Island (SCC). Finally, Duncan claims that the trial court erred in refusing to permit his expert witness to opine as to the quality of the SCC treatment program. It appears that Duncan

believes the trial court's evidentiary rulings present significant constitutional questions of law. PFR at 1-2; RAP 13.4(b)(3).

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

The State of Washington filed a petition in Benton County Superior Court on March 22, 1996, alleging that Bryan Duncan (Duncan) is a sexually violent predator. CP 1870-1871. In October 2005, the Honorable Craig J. Matheson presided over a jury trial on that issue. At the conclusion of the trial, the jury returned a verdict finding Duncan to be a SVP. CP at 9. The trial court entered an order committing Duncan to the custody of the Department of Social and Health Services for placement in a secure facility. CP at 29-30. On December 4, 2007, the Court of Appeals, Division III, filed a published opinion affirming the commitment order. App. 1.

##### **B. Substantive History**

Bryan Duncan is a schizophrenic child molester who suffers from pedophilia. 11/2/05 RP 1074-5. He claims to have molested between twenty and forty children, and has an IQ that ranges between 72 and 88. 11/2/05 RP 1067, 1085. At trial, reports of Mr. Duncan's past crimes were corroborated by the testimony of some of his victims. The jury also heard the State's expert Leslie Rawlings, Ph.D., a licensed psychologist

and certified sex offender treatment provider, opine that Duncan's pedophilia was a "mental abnormality" for purposes of the SVP determination, and that he is likely to continue to commit acts of predatory sexual violence if released. 11/2/05 RP 1126.

Duncan had been evaluated by Dr. Rawlings in March 1996. CP at 1817. After that 1996 evaluation was completed, Dr. Rawlings prepared a written report reflecting his opinions and conclusions. Dr. Rawlings' report indicates that he conducted a clinical interview with, and psychological testing of Duncan in March 1996. CP at 1818.

Four years after the case was filed, and despite numerous trial settings, the matter had still not proceeded to trial. Consequently, on May 3, 2000, the State filed a motion to have Duncan submit to a supplemental mental examination by Dr. Rawlings. CP at 1753-1761. The State's motion was based upon CR 35. CP at 1753. It does not appear from the record that Duncan filed any formal objection to the State's CR 35 motion. On May 9, 2000, the trial court granted the State's motion. CP at 1748-1750. In its order, the trial court indicated that failure to comply with the order could result in the imposition of the sanctions outlined in CR 37. CP at 1750.

On August 25, 2000, the State filed a motion for CR 37 sanctions based upon Duncan's refusal to meet with Dr. Rawlings. CP at 1721-

1729. After considering the State's motion and Duncan's response, the trial court granted the State's motion, and ordered that Duncan be prevented from presenting any expert testimony on the issue of whether he suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence if he is not confined to a secure facility, one of the central issues at Duncan's trial. CP at 1694. Despite the 2000 order granting the evaluation and the subsequent order granting CR 37 sanctions, Duncan never participated in a clinical interview by Dr. Rawlings after March 1996. 11/3/05 RP 1328.

At trial, the State also presented the testimony of Dr. Paul Spizman. Dr. Spizman is a psychologist who works at the SCC, a state-run treatment facility for SVPs. 11/4/05 RP 1402-3. Dr. Spizman testified regarding Duncan's living arrangements at the SCC, and the various infractions Duncan committed while there. 11/4/05 RP 1408-13. He also testified that he would be concerned if Duncan were released because Duncan had not learned to engage in healthy relationships. 11/4/05 RP 1413.

Despite the trial court's order sanctioning him, Duncan presented the testimony of two experts at trial, Dr. Richard Wollert and Dr. Robert Halon. *See generally* 11/7/05 RP 1153 through 11/9/05 RP 1906; 11/9/05 RP 1929 through 11/10/05 RP 2039. Dr. Wollert

largely limited his testimony to the validity of the actuarial instruments used by Dr. Rawlings, discussion of the validity of those instruments when applied to juvenile offenders, and the impact of brain development on the test results. Dr. Halon, on the other hand, was permitted to testify regarding whether Duncan suffered from a mental abnormality that makes him likely to engage in predatory acts of sexual violence if he is not confined. Cf. 11/8/05 1768-72; 11/10/05 RP 2029-30. Specifically, Dr. Halon opined that Duncan did not suffer from pedophilia. Rather, Dr. Halon testified that Duncan's deviant behavior was driven by a need to "experiment," and there was no evidence that Duncan has a preference for children. 11/9/05 RP 1972-78.<sup>1</sup>

## V. REASONS WHY REVIEW SHOULD BE DENIED

### A. Pursuant to RAP 13.4(b), Duncan's Claim That he was Unfairly Prejudiced by Testimony Regarding Dr. Rawlings' Inability to Interview him Prior to Trial is Inappropriate for Discretionary Review by This Court

Duncan argues that the trial court erred in allowing the State to elicit testimony by Dr. Rawlings that he would like to have interviewed Mr. Duncan a second time, but that he was not able to do so. PFR at 7.

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<sup>1</sup> It is not clear from the record why the Order Granting Petitioner's Motion for Sanctions was not enforced at trial. However, *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002), holding that the State cannot compel a CR 35 psychological evaluation in the context of SVP proceedings, was issued after entry of that Order and before the commencement of Duncan's trial. The State assumes that trial counsel intentionally chose, in light of *Williams*, to forgo any attempt to enforce sanctions.

Citing *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002), and *In re Detention of Marshall*, 156 Wn.2d 150, 125 P.3d 111 (2005) he argues that the State had no right to any additional personal interview and as such, any testimony regarding Mr. Duncan's failure to participate in a subsequent interview was more prejudicial than probative.

Duncan's request for further review should be denied for several reasons. First, his claim of error is actually based on ER 403, and, as such, it is not appropriate for discretionary review by this Court. Second, there is nothing in the language of *Williams* or *Marshall* that precluded the State from eliciting testimony from Dr. Rawlings to the effect that he would like to have been able to update his 1996 interview but was not able to do so. Third, the trial court correctly determined that, where the defense had attacked Dr. Rawlings' credibility on the basis of the lack of a post-1996 interview, the State was entitled to clarify why no interview had occurred. Mr. Duncan's arguments are without merit and should be rejected.

**1. Duncan's ER 403 argument does not involve a significant question of constitutional law**

On appeal to the Court of appeals, Duncan's claim that he was unfairly prejudiced by the admission of testimony regarding his refusal to be clinically interviewed by the State's expert was founded upon ER 403. *See App. 1 at 5.* Such error, if any, is not of constitutional magnitude,

*State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272, 275 (1990) (citing *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). For this reason, Duncan's Petition for Review fails to meet the requirements of RAP 13.4(b), and should be denied.

**2. The appellate court's ruling that the trial court did not abuse its discretion by permitting the State's expert to explain why he had not interviewed Duncan does not conflict with any decision of this Court or the Court of Appeals**

Duncan's attempt to use *Williams* and *Marshall* in support of his request for further review of his case is misplaced. He reports that those cases hold that, in an SVP case, the State is not entitled to utilize the procedures of CR 35 to obtain a pre-trial psychological evaluation of the SVP detainee. However, the question of whether the State has a "right" to a CR 35 evaluation is not at issue in this case.<sup>2</sup> Rather, the question is, where Duncan intentionally attacked the State's expert's credibility based on that expert's failure to conduct a supplemental interview prior to trial,

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<sup>2</sup> The State does not dispute that, pursuant to *Williams*, a CR 35 evaluation would not, at the time of trial, have been available to the State. The State did not, however, ever obtain a CR 35 evaluation of Duncan and, as explained above, never sought to enforce its CR 37 Order for sanctions. In this case, as in *Marshall*, no CR 35 evaluation was conducted prior to trial. Rather, for the purpose of updating his original 1996 evaluation of Mr. Duncan, Dr. Rawlings conducted a record review of "over 5,000 pages" of documents relating to Mr. Duncan's criminal history and incarceration, treatment history, and past psychological evaluations. Compare *Marshall* at 160, 125 P.3d 111, 116; 11/2/05 RP 1052-3.

did the trial court abuse its discretion by allowing the State to respond to those attacks and explain, in an exceedingly restrained way, that failure.

At trial, during its direct examination of Dr. Rawlings, the State carefully limited its questioning regarding the logistics of Dr. Rawlings' interview of Duncan:

Q: Did you meet with Mr. Duncan?

A: I did. I met with Mr. Duncan in March of 1996 for about six and a half hours of direct interview, and then there was an additional time span with psychological testing.

Q: And where was he at that time?

A: Well, at that time Mr. Duncan was at Maple Lane School, which is a juvenile rehabilitation institution for adolescents and young adults.

11/2/05 RP 1053-4. Although the content of the 1996 interview was later discussed during Dr. Rawlings' testimony on direct, the State refrained from asking him to clarify or explain why he had not interviewed Duncan in the nine-years since. *See* 11/2/05 RP 1062-3.

During cross-examination, however, defense counsel overtly highlighted this fact during the following exchange:

Dr. Rawlings: . . . Now the other side of this is, though, that [Mr. Duncan] has continued to experience fantasies and continues to masturbate to thoughts about sex with kids, and that's something there has not been a change in.

Mr. Thompson: **Now that, of course, is based on what others have written about Bryan?**

A: Well, it's what he's told other people. It's what he said with his own mouth.

Q: **Well, again you weren't there, were you?**

A: No, no, I wasn't there, but I might point out that Bryan's own expert a Dr. Halon evaluated Bryan Duncan in 2001, and he told Dr. Halon that he continued to have fantasies about having sex with kids, with boys, and that he felt that he wasn't able to control himself at times. So that's what he's told not just the people at the Special Commitment Center but of [sic] also individuals outside of the Special Commitment center, at least one individual.

Q: **That's what has been written about him? Is that correct?**

A: Yes.

11/3/05 RP 1256-7 (emphasis added).

Only after this attempt to undermine Dr. Rawlings' credibility did the State attempt, on redirect, to mitigate its impact. At that point, the State posed three pertinent, constrained questions: First, Dr. Rawlings was asked if he would "have liked [an] opportunity to update your evaluation of him by meeting with him?" 11/3/05 RP 1328. The single-word response to this question was "yes." *Id.* The next day, after argument on the subject by counsel, Dr. Rawlings was asked whether he requested another interview of Duncan, to which he responded that he had. He was then asked, following that request, whether he "was able" to interview Duncan. 11/4/05 RP 1341. To the final question, Dr. Rawlings replied, "no." *Id.* No further testimony on the subject was elicited by the State or received by the jury. Also, the State did not attempt to elicit any evidence to the effect that Duncan refused or avoided a subsequent

interview. Moreover, in response to a juror's question as to why the second interview had not occurred, the trial court advised the jury that Duncan had no obligation to participate. 11/9/05 RP 1921.

Admission or exclusion of relevant evidence is within the sound discretion of the trial court, which has broad discretion to balance the probative value of evidence with its potentially prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). A trial court's ruling under ER 403 is subject to review only for abuse of discretion. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). Duncan's argument that the evidence of Dr. Rawlings' inability to conduct a post-1996 interview unfairly gave the jury the impression that he had something to hide fails to recognize that this evidence was relevant on several grounds. Clearly, any actions taken, or not taken, by Dr. Rawlings when conducting his assessment of Duncan are relevant to the credibility of the result. Given the nine year passage of time between Dr. Rawlings' initial interview of Duncan and the trial, and the inference raised by defense counsel during cross-examination, the State had an interest in explaining why follow-up contact with Duncan had not occurred. These two purposes are proper. Consequently, the trial court's decision to admit evidence implying a refusal to participate was

not error. 11/4/05 RP 1340; *See, e.g., State v. Chase*, 59 Wn. App. 501, 507-8, 799 P.2d 272, 275-6 (Div. 2, 1990). Because the Court of Appeals correctly recognized the propriety of the trial court's actions, further review need not be granted.

**B. Pursuant to RAP 13.4(b), Duncan's Claim That he was Unfairly Prejudiced by Trial Testimony Concerning the Criminal History of his Proposed Roommate is Inappropriate for Discretionary Review by This Court**

Again utilizing the ER 403 "unfair prejudice" allegation, Duncan objects to the trial court's admission of evidence concerning the criminal history of Dion Walls, the man Duncan proposed as his roommate in the event of his release. PFR at 12. Specifically, Duncan alleges that the trial court failed to balance the probative value of Walls' history of sexually abusing children against the prejudicial effect of that evidence upon Duncan's case. *Id.* at 14. However, as noted above, error due to violation of ER 403 is not of constitutional magnitude. Further, Duncan fails to allege that the appellate court's decision in this case is in conflict with any other decision of this Court or the appellate courts. For these reasons, his Petition for Review should be denied.

Even if this Court were to grant review, Duncan did not object to testimony regarding Mr. Walls' criminal history at trial.<sup>3</sup> Nor did Duncan

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<sup>3</sup> In response to the proposed introduction of Mr. Walls' criminal background, defense counsel argued that introduction of such evidence opened the door to

raise ER 403 or allege undue prejudice when the State sought to introduce this evidence. *Jackson*, 102 Wn.2d at 695, RAP 2.5(a). As such, he waived this argument. Regardless, any possibility of prejudice is more than outweighed by probative value of Mr. Walls' history of sexual offending against children. Mr. Walls had struck up a relationship with Duncan while both men were confined at the SCC. 11/7/05 RP 1507. He had subsequently been released into the community and, as of the date of Duncan's trial, was not known to have committed any new offenses. 11/9/06 RP 1812-13. Thus, evidence relating to his history of sex offenses against children tended to prove Duncan's likelihood of re-offense by showing that, if released, Duncan planned to associate closely with an individual who had committed like offenses.

In addition, the evidence also tended to corroborate Dr. Rawlings' diagnosis of Duncan as a pedophile. These two purposes are proper, and directly relevant to central trial issues. Moreover, the evidence was introduced through a defense expert, Dr. Richard Wollert, who was called to testify regarding the issue of likelihood of reoffense. In addition, Duncan himself had already testified that Mr. Walls was "his boyfriend,"

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introduction of other evidence concerning the "success in the community" enjoyed by Mr. Walls since his release. 11/9/06 RP 1812-14. At the end of the colloquy, the trial court concluded, without responsive comment by defense counsel, that counsel was "trying to raise a flag," but was not objecting to the proffered testimony. 11/9/05 RP 1815.

and that Mr. Walls “might have mentioned [his sex offending history] in passing.” 11/7/05 RP 1508.

In light of these circumstances, the probative value of Mr. Walls’ criminal history was not substantially outweighed by the danger of unfair prejudice. Thus, admission of evidence of Mr. Walls’ background did not constitute an abuse of discretion, and further review should be denied.

**C. Duncan’s Right to Due Process was not Violated by Limiting the Scope of his Cross-Examination of Dr. Spizman**

Duncan argued to the Court of Appeals that his cross-examination of Dr. Paul Spizman was improperly limited by the trial court, and the limitation violated his right to due process. PFR at 15-16. Specifically, Duncan continues to allege that the trial court erroneously precluded cross-examination of Dr. Spizman on the issue of his opinion regarding the effectiveness of the special needs sex offender treatment program at the SCC. However, this argument is without merit because Duncan’s trial theory – that is, that the SCC treatment program is flawed – was effectively presented at trial without this additional testimony.

Division Three found that trial court’s limitation on the cross examination of Dr. Spizman “did not increase the risk that Mr. Duncan would be erroneously committed,” and Duncan’s right to due process of law remained unaffected. App. 1 at 10. Such is particularly true when viewed in the context of ER 611(b), which mandates, “[c]ross examination **should be limited** to the subject matter of the direct

examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” (emphasis added) “It is a basic and essential rule that ‘[t]he extent of the cross-examination of a witness upon collateral matters which tend to affect the weight to be given the witness’ testimony rests within the sound discretion of the trial court.” *State v. Temple*, 5 Wn. App. 1, 4, 485 P.2d 93 (1971) (citing *State v. Goddard*, 56 Wn.2d 33, 37, 351 P.2d 159 (1960)).

In determining what procedures due process requires, the court will balance three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *In re Detention of Brock*, 126 Wn. App. 957, 964, 110 P.3d 791, 794 (Div. 1, 2005). Here, the appellate court applied this analysis and found the risk of erroneous deprivation of Duncan’s liberty interest due to the limitation on cross-examination of Dr. Spizman was negligible. Dr. Spizman was a staff member at the SCC who was called to recount the infractions Duncan had committed during his time there. In declining Duncan’s request to cross-examine Dr. Spizman regarding the “effectiveness” of the SCC treatment program, the trial court correctly

noted that this case was about Duncan, not “the system,” and that Duncan was free to criticize the SCC treatment options through his own testimony. 11/4/05 RP 1420-24. The court permitted defense counsel to question Dr. Spizman about how success in treatment was measured, and to elicit testimony that Duncan was currently in the first of seven phases of treatment. 11/4/05 RP 1424-26. In addition, Duncan also told the jury through his own testimony that he did not think the available treatment at the SCC was “meaningful.” 11/9/05 RP 1927.

Regardless of whether Dr. Spizman would have agreed that the SCC’s special needs treatment program would not have been “meaningful” for Mr. Duncan, that defense was made available through testimony of other witnesses throughout the trial. As a result, Duncan’s liberty interest remained intact, and the Court of Appeals correctly ruled that his argument is without merit. For this reason, his Petition for Review should be denied.

**D. Duncan’s Right to Due Process was not Violated by Exclusion of Dr. Halon’s Opinion Regarding the Effectiveness of the SCC’s Treatment Program**

Duncan argues that his right to due process was violated when the trial court excluded opinion testimony of defense expert Dr. Halon regarding the effectiveness of the special needs sex offender treatment program at the SCC. However, as was simply put by Division Three, “the

relevant issue in this civil commitment proceeding was whether a current mental abnormality made Duncan likely to engage in predatory acts of sexual violence if released.” App. 1 at 12. Thus, to allow the defense expert to opine as to the perceived shortcomings of the treatment available to Duncan if the jury determined he should continue to be confined was patently irrelevant to the issue at hand.

An examination of the record reveals that the Court of Appeals was on firm ground when it held that exclusion of Dr. Halon’s testimony about the quality of SCC treatment was not an abuse of discretion. Admissibility depends on whether “(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.” *Id.* (internal citations omitted):

The [expert’s] opinion must be founded on facts in evidence, whether disputed or undisputed, and all material facts necessary to the formulation of a sound opinion must be considered. If the expert’s opinion assumes the existence of conditions or circumstances not of record, its validity dissolves and the answer must be stricken. So long as the answer is fairly based on material facts, supported by substantial evidence under the examiner’s theory of the case, however, the opinion testimony is proper. The trial court has wide discretion to determine whether expert testimony falls within the above rules.

*Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653, 508 P.2d 1370, 1375 (Wn. App. 1973) (internal citations omitted).

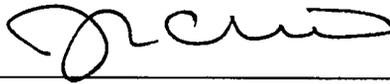
In this case, there was little, if any, evidence presented that suggests that Dr. Halon was qualified to opine as to whether the special needs treatment program at the SCC was likely to be "successful." Dr. Halon is a forensic psychologist who is licensed in California, and does not practice in Washington. 11/9/05 RP. The primary purposes of Dr. Halon's testimony were to offer a diagnosis of Duncan and to render an opinion regarding the reliability of the actuarial instruments used by Dr. Rawlings. 11/9/05 RP 1972-78; 11/10/05 RP 1996-2002. 1929. He testified that he had been to the SCC "probably six" times. 11/10/05 RP 2002. Dr. Halon's sole experience with the special needs treatment program at the SCC comes through his review of the "protocol or something." 11/10/05 RP 2004. Nor did Dr. Halon indicate, when describing his areas of expertise, that he had experience assessing the quality of treatment facilities or programs. Accordingly, any opinion Dr. Halon might have offered regarding the treatment program at the SCC would not have been founded upon any facts of record. Exclusion of such opinion testimony was not an abuse of discretion, and the Court of Appeals was correct to deny Duncan's claim of error. Further review of the issue should also be denied.

**VI. CONCLUSION**

For the foregoing reasons, the State requests that this Court deny  
Duncan's Petition for Review.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of March, 2008.

ROBERT M. MCKENNA  
Attorney General



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JOSHUA L. CHOATE, WSBA #30867  
Assistant Attorney General  
Attorneys for Petitioner

# Appendix 1



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intercourse with her when he was 13 years old. The second count involved acts against a 10-year-old boy when Mr. Duncan was 13 years old. All of these incidents occurred in Benton County and all were defined as sexually violent offenses in former RCW 71.09.020(6) (1995). Mr. Duncan was also adjudged guilty in separate actions for two counts of communication with a minor for immoral purposes. Mr. Duncan was committed to the Department of Juvenile Rehabilitation for three consecutive 52-week sentences following these adjudications. He served his sentences at Maple Lane School, a juvenile facility in Centralia.

Mr. Duncan participated in a sex offender treatment program while at Maple Lane. He admitted sexual acts with more than 20 children between 1984 and 1992. One Maple Lane case manager reported that Mr. Duncan claimed between 70 and 100 victims. During a mental health assessment in 1996, Mr. Duncan admitted to sexual activity with as many as 40 children. These victims, mostly male, ranged in age from 2 to 13 years old. The sexual acts included vaginal and anal intercourse, forced sexual games, fellatio, fondling, and masturbation. Mr. Duncan also revealed in counseling that he fantasized about sex with children and that these fantasies sometimes involved the mutilation, killing, and eating of his victims. He received over 75 infraction reports for non-compliance with staff orders, acting out, and violence during his stay at Maple Lane.

Mr. Duncan was due to be released from Maple Lane School in late March 1996, on his 21st birthday. On March 22, 1996, the State filed a petition for commitment of

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Mr. Duncan as an SVP. RCW 71.09.030. He was then moved to the Special Commitment Center (SCC) pending the outcome of the petition. For a variety of reasons—mostly at the request of Mr. Duncan’s counsel—the commitment trial was delayed until October 2005. The jury concluded that Mr. Duncan was a sexually violent predator.

#### DISCUSSION

Mr. Duncan assigns error to a number of the court’s rulings on evidence. The trial court has wide discretion on questions of evidence. *In re Det. of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006). Evidentiary rulings usually are not of constitutional magnitude. So even an erroneous ruling must materially affect the outcome of the trial to warrant reversal. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

#### UNFAIR PREJUDICE

Mr. Duncan first contends the trial court abused its discretion by admitting evidence that he refused to submit to a psychological examination during pretrial discovery. He contends this evidence was unfairly prejudicial.

Dr. Leslie Rawlings is a psychologist. He evaluated Mr. Duncan in 1996 just before the State filed its petition for commitment. He considered his 1996 evaluation and Mr. Duncan’s history of sex offenses. He reviewed his records. And he undertook an actuarial risk assessment. The actuarial approach to risk assessment uses a statistical analysis to identify a limited set of risk factors that assist in the prediction of future

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dangerousness. *In re Det. of Thorell*, 149 Wn.2d 724, 753, 72 P.3d 708 (2003). Dr. Rawlings concluded that Mr. Duncan exhibited schizophrenia and severe pedophilia and had great difficulty controlling his sexual behavior. He testified that this mental abnormality made it more likely than not that Mr. Duncan would commit acts of predatory violence if not confined.

Dr. Rawlings admitted that his conclusion that Mr. Duncan still fantasized about children was based "on what others have written." Report of Proceedings (RP) at 1256. The State then asked whether he would have liked an opportunity to update his evaluation of Mr. Duncan. Dr. Rawlings said yes. The State then asked, "And what stopped you from doing that?" *Id.* at 1328.

Mr. Duncan moved for a mistrial. He argued that the question put Mr. Duncan in a "terrible light." *Id.* at 1329. Left dangling, the question suggested that he was hiding something. A respondent in a commitment proceeding cannot be compelled to submit to a mental examination during pretrial discovery under chapter 71.09 RCW. *In re Det. of Marshall*, 156 Wn.2d 150, 154, 125 P.3d 111 (2005).

The trial judge ruled that the State could ask whether Mr. Duncan had refused a mental examination because this was a civil action and Mr. Duncan therefore had no right to confrontation or to remain silent. The court also concluded that fairness entitled the State to ask whether Mr. Duncan had consented to a more recent interview because he had made the point that Dr. Rawlings' opinion was to some degree based on hearsay

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reports. The court denied Mr. Duncan's motion for mistrial. The State then asked Dr. Rawlings if he had asked to interview Mr. Duncan again. Dr. Rawlings answered, "Yes." RP at 1341. The State then asked, "And were you able to interview him?" *Id.* Dr. Rawlings answered, "No." *Id.* No further testimony was presented on this subject.

Mr. Duncan contends it was unfairly prejudicial to allow Dr. Rawlings to testify that he had not been able to interview Mr. Duncan. Testimony that is likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. *State v. Ortega*, 134 Wn. App. 617, 624, 142 P.3d 175 (2006), *review denied*, 160 Wn.2d 1016 (2007); *State v. Stackhouse*, 90 Wn. App. 344, 356, 957 P.2d 218 (1998); ER 403. Such testimony should be excluded if its potential prejudice substantially outweighs its probative value. *Stackhouse*, 90 Wn. App. at 356. The trial court must weigh the proffered evidence in context to make this decision. *Id.*

The State argues that Mr. Duncan waived this issue because he did not specifically ask the trial court to balance the probative value of the evidence against its prejudicial effect. But Mr. Duncan objected to the admission of this evidence. And the trial court considered both its relevance and its fairness. Accordingly, we conclude that the issue was properly preserved for appeal.

Mr. Duncan does not have a constitutional right to refuse a mental examination. He has a statutory right to do so. *In re Det. of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006). Nor does he have a Fifth Amendment right to remain silent about the

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examination. *Id.* Jurors here asked him why he chose not to be reevaluated for this trial. The trial court answered: "Mr. Duncan did not wish to do so, and the Court did not order him to participate in further evaluation." RP at 1921. We conclude that the trial court did balance the possibility that this information was prejudicial against its relevance. Mr. Duncan asked about Dr. Rawlings' reliance on hearsay information. The court then concluded that it was only fair to allow the State to ask why Dr. Rawlings had to rely on secondhand information. Those are tenable grounds for the judge's ruling.

This was an SVP civil commitment proceeding. A central issue then was Mr. Duncan's current mental state and his likelihood to engage in predatory acts of sexual violence if released. *In re Det. of Kelley*, 133 Wn. App. 289, 292, 135 P.3d 554 (2006), *review denied*, 159 Wn.2d 1019 (2007). Reliable, up-to-date information on Mr. Duncan's psychological state was highly relevant. And an explanation why the State could not provide current information was also therefore relevant. The trial court did not abuse its discretion in allowing the State to pursue this line of questioning. *Stackhouse*, 90 Wn. App. at 356.

Mr. Duncan next assigns error to the trial court's admission of evidence that he intended to move in with convicted child molester Clarence Walls. Mr. Duncan had a sexual relationship with Mr. Walls while both were incarcerated in the SCC. Mr. Walls was released from the SCC in 2004 after the State agreed to dismiss an SVP petition against him. Mr. Duncan's expert, Dr. Richard Wollert, is a psychologist. In Mr. Walls'

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SVP proceeding, Dr. Wollert had questioned the effectiveness of the actuarial tools in predicting recidivism in juvenile offenders. The court ordered Mr. Duncan not to question Dr. Wollert about Mr. Walls' case in front of the jury.

The State showed on cross-examination of Dr. Wollert that Mr. Duncan intended to move in with Mr. Walls. Mr. Duncan argued, outside the presence of the jury, that this opened the door to inquiry about the Walls proceeding and specifically to inquiry about why the SVP proceeding against Mr. Walls was dismissed. The court disagreed and refused to allow the inquiry of Dr. Wollert.

Mr. Duncan now contends the admission of Mr. Walls' criminal sexual history was unfairly prejudicial. He did not object on the basis of prejudice at trial. But that aside, we conclude that the trial court did not abuse its discretion. Mr. Duncan testified that he had an adult sexual relationship with Mr. Walls and now had appropriate masturbatory fantasies as a result. The fact that Mr. Walls had a history of sexually abusing children was relevant, given the fact that Mr. Duncan intended to live with him.

Moreover, Mr. Duncan had the opportunity to address that fear. In response to a juror who asked what he would do if he found out Mr. Walls was sexually molesting children in their apartment, Mr. Duncan answered that he would leave and call the police. Information that Mr. Duncan's intended roommate had a history of sexual offenses against children was not then unfairly prejudicial under the circumstances. *Stackhouse*,

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90 Wn. App. at 356. And the trial judge did not, therefore, abuse his discretion by refusing further inquiry into the Walls proceeding.

LIMITATION ON CROSS-EXAMINATION RE: SUCCESS OF THE SCC PROGRAM

Dr. Paul Spizman is a psychologist at the SCC. He testified for the State. He related Mr. Duncan's history of treatment and infractions at the SCC. He also stated that untreated sexual offenders have great difficulty learning to control criminal sexual behavior. On cross-examination, Mr. Duncan's counsel asked Dr. Spizman if he was aware of complaints about treatment at the SCC, including a federal lawsuit filed by Mr. Duncan alleging inadequate treatment. The State objected and argued that the parties had agreed that the federal lawsuit, which was still unresolved, was irrelevant to this civil commitment proceeding. Mr. Duncan argued that the success of the treatment program was now relevant due to the emphasis placed on his refusal to seek therapy. The trial court ruled that evidence about the federal lawsuit and the success or failure of the SCC's treatment program was "not the issue before this Court, and we can't possibly do it justice in any reasonable length of time." RP at 1424.

Mr. Duncan now assigns error to the trial court's refusal to allow him to ask about the success of the SCC programs generally.

A trial court has discretion to set the scope of cross-examination. ER 611(b). And we will not reverse the trial court's ruling absent a manifest abuse of that discretion. *State v. McDaniel*, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996). Cross-examination

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should be limited to the subject matter of the direct examination and the credibility of the witness. But inquiry into other matters may be allowed. ER 611(b).

Involuntary commitment of an SVP under chapter 71.09 RCW is a civil proceeding. The Sixth Amendment right to confrontation does not, then, apply. *In re Det. of Brock*, 126 Wn. App. 957, 963, 110 P.3d 791 (2005). But due process may guarantee certain procedures in cross-examining witnesses because of the significant deprivation of liberty at stake. *Id.* We consider three factors: “(1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards; and (3) the governmental interest.” *Id.* at 964.

The private interest affected here is Mr. Duncan’s freedom from involuntary commitment. This interest is substantial. *Id.* But so is the State’s interest in limiting testimony to relevant issues. *See id.* (finding substantial government interest in limiting expert witnesses at SVP show cause hearing when documentary evidence is sufficient). In light of the relatively equal weight of these interests, the second factor becomes dispositive.

The court allowed Mr. Duncan to cross-examine Dr. Spizman. But the court refused to allow inquiry of Dr. Spizman as to the treatment program’s success rate. Mr. Duncan was allowed to testify that he chose not to attend treatment at the SCC because he did not find it meaningful for him. It was within the trial court’s discretion to limit a

foray into the side issue of the program's general success rate for other participants. ER 611(b); *State v. King*, 113 Wn. App. 243, 289, 54 P.3d 1218 (2002) (scope of cross-examination is within the trial court's sound discretion).

The relevant question here was whether Mr. Duncan currently had a mental abnormality that made him likely to engage in predatory acts of sexual violence. Former RCW 71.09.020(1) (1995). The trial court's refusal to allow cross-examination into the general success of the SCC's treatment program did not increase the risk that Mr. Duncan would be erroneously committed. *Brock*, 126 Wn. App. at 964. The trial court did not deny Mr. Duncan's right to due process of law. Accordingly, the trial judge did not abuse his discretion by limiting the scope of questions put to Dr. Spizman on cross-examination.

#### EXCLUSION OF EXPERT TESTIMONY

Finally, Mr. Duncan contends the trial court denied him his right to due process by preventing another witness from testifying about the effectiveness of the mental health treatment at the SCC. Dr. Robert Halon is a forensic psychologist and marriage therapist. He testified that he gave Mr. Duncan a Rorschach (ink blot) test that indicated Mr. Duncan was not a schizophrenic. Dr. Halon felt that Mr. Duncan was impulsive, still fantasized about children, and could reoffend if angered. But he did not think the evidence established that Mr. Duncan had a mental abnormality such as pedophilia.

Mr. Duncan's lawyer asked Dr. Halon if he had reviewed the treatment program at the SCC. Dr. Halon answered that he had reviewed the protocol and the deposition of an employee at the SCC. The State objected to Dr. Halon giving an opinion on the quality of treatment at the SCC. The State argued that this testimony was not relevant. The trial court agreed. It noted that Mr. Duncan could testify that he did not pursue treatment at the SCC because it did not help him. An expert's opinion on the general success rate of treatment at the SCC, the court continued, was just too much of a side issue. Mr. Duncan contends this limitation on expert testimony prevented him from rebutting the State's evidence that he simply chose not to participate in treatment. He asserts the inadequacy of the SCC treatment program was an essential element of his defense.

Again, we review a trial court's decision to exclude expert testimony for abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004); ER 702. The right to present defense witnesses is a fundamental element of due process. *State v. Ellis*, 136 Wn.2d 498, 527, 963 P.2d 843 (1998) (Talmadge, J., dissenting). This right is not unfettered, however. *Id.* at 528. The proffered evidence must be relevant. *Id.* In other words, the expert testimony must be helpful to the trier of fact. *Willis*, 151 Wn.2d at 262. Mr. Duncan urges this court to apply the procedural due process balancing factors set out in *Brock*, 126 Wn. App. at 964. But the offer of this expert testimony did not implicate the confrontation rights at issue in *Brock*. See *State v. Stenson*, 132 Wn.2d 668, 715 n.9, 940 P.2d 1239 (1997) (the proper test for the admissibility of expert testimony is under

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ER 702, not the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (adopted in *Brock*, 126 Wn. App. at 964)).

Dr. Halon had testified that Mr. Duncan had a developmental disability and that treatment programs are not very effective for people with developmental disabilities. Mr. Duncan argued that Dr. Halon's opinion of the quality of treatment at the SCC was necessary to show that even if Mr. Duncan had attended the treatment program, it would not have made a difference. But again, the relevant issue in this civil commitment proceeding was whether a current mental abnormality made Mr. Duncan likely to engage in predatory acts of sexual violence if released. Former RCW 71.09.020(1); former RCW 71.09.060(1) (1995). The success rate of a program is barely relevant to that question, and in any event is a side issue. The trial court did not then abuse its discretion by refusing to allow expert testimony on the success rate of the SCC treatment program.

#### CUMULATIVE ERROR

Mr. Duncan contends that even though the claimed evidentiary errors standing alone may not justify reversal, cumulatively they denied him a fair trial. We will reverse for cumulative error when several errors that are not sufficient standing alone may be prejudicial in their cumulative effect. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). We have concluded that the trial court did not err in its evidentiary rulings. There was then no cumulative error. *Korum*, 157 Wn.2d at 652.

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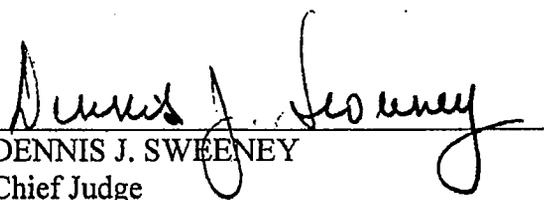
In the Matter of the Detention of	)	
	)	No. 24820-8-III
BRYAN DUNCAN,	)	
	)	
Appellant.	)	ORDER DENYING
	)	MOTION FOR
	)	RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of December 4, 2007, is denied.

DATED: January 11, 2008

FOR THE COURT:

  
 DENNIS J. SWEENEY  
 Chief Judge